United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

No. 1330.

PURITY ICE COMPANY, A CORPORATION, APPELLANT,

vs.

THE HAWLEY DOWN DRAFT FURNACE COMPANY OF MARYLAND, A BODY CORPORATE, FOR THE USE OF HENRY VICK, GEORGE F. WHITING, AND FREDERICK H. GOTTLEIB, COPARTNERS TRADING AS VICK, WHITING & CO., LESSEES OF THE HAWLEY DOWN DRAFT FURNACE CO. OF MARYLAND.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	*a*	1
Declaration	1	1
Particulars of demand	5	4
Plea	6	4
Joinder of issue	6	5
Memorandum as to verdict	7	5
Judgment	7	5
Appeal and order for citation	8	6
Citation	9	6
Memorandum: Appeal bond filed	10	7
Bill of exceptions made part of record	10	7
Bill of exceptions	11	8
Testimony of Henry Vick	11	8
Contract	11	8
Testimony of Lee Hutchins	18	12
J. E. McGaw	20	13
George C. Thompson	27	17
Plaintiff's prayer	29	18
Time to file transcript extended	30	18
Clerk's certificate	31	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1903.

In the Court of Appeals of the District of Columbia.

PURITY ICE COMPANY, Appellant,
vs.
THE HAWLEY DOWN DRAFT FURNACE COMPANY OF Maryland *et al.* } No. 1330.

a Supreme Court of the District of Columbia.

THE HAWLEY DOWN DRAFT FURNACE COMpany of Maryland, a Body Corporate, for the Use of Henry Vick, George F. Whiting, and Frederick H. Gottlieb, Co-partners Trading as Vick, Whiting & Co., Lessees of the Hawley Down Draft Furnace Co. of Maryland, Plaintiff,
vs.
PURITY ICE COMPANY, a Corporation. } No. 44900. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration.*

Filed August 27, 1901.

In the Supreme Court of the District of Columbia.

THE HAWLEY DOWN DRAFT FURNACE COMpany of Maryland, a Body Corporate, for the Use of Henry Vick, George F. Whiting, and Frederick H. Gottlieb, Co-partners Trading as Vick, Whiting & Co., Lessees of the Hawley Down Draft Furnace Co. of Maryland,
vs.
PURITY ICE COMPANY, a Corporation. } At Law. No. 44900.

1st. count.

The plaintiff, a corporation created under the laws of the State of West Virginia, sues the defendant, a corporation incorporated under

the laws of the District of Columbia for money payable by the defendant to the plaintiff for that the defendant heretofore, to wit, on the 11th day of February 1901, for a valuable consideration, entered into a certain contract with the plaintiff concerning the sale and delivery by the plaintiff to the defendant of two certain furnaces which contract is in the words and figures following, that is to say:

"The Hawley Down Draft Furnace Co. of Maryland; Vick, Whiting & Co., lessees, Manufacturers' building.

BALTIMORE, *Feb.* 11*th*, 1901.

Purity Ice Company, Washington, D. C.

GENTLEMEN: We propose to furnish you two Hawley down
2 draft furnaces and attach same to Campbell & Zell boilers of about 275 H. P. each. We to furnish suitable front (lower part) grate bars and all necessary pipes and fittings, also all special tile necessary to make the furnace part complete. For the sum of twenty-five hundred dollars $2500.00

Terms two hundred dollars on the completion of our work, and the balance to be paid in monthly installments 10% of coal bill each; payable not later than the 5th of each month.

We agree to furnish free of cost for a term of two years any part of water grate or water connections.

Furnace to remain our property until accepted and paid for by purchaser.

No provision hereof can be waived or varied, except in writing and signed by us.

THE HAWLEY DOWN-DRAFT FURNACE CO. OF MARYLAND.
VICK, WHITING & CO., *Lessees.*
HENRY VICK, *Manager.*

Accepted.
PURITY ICE COMPANY,
By J. E. McGAW, *Mgr.*

We accept conditions of above proposition and agree to make settlement accordingly.

The completion of the boilers not to be delayed by the attachment of furnaces."

And the plaintiff says that in pursuance of said contract, the plaintiff furnished and delivered to the defendant two Hawley down-draft furnaces and attached the same to Campbell & Zell boilers, of about 275 H. P. (horse power) each, and did furnish suitable front (lower part) grate bars and all necessary pipes, fittings, also all spe-
3 cial tile necessary to make the furnace part complete, and in all respects complied with the terms of said contract and completed said work in accordance therewith, to wit, on the 28th day of May, 1901, in the city of Washington, and District of Columbia, and

the defendant accepted the said furnaces and has continued to use them since the last mentioned date, and thereby the plaintiff became entitled to receive from the defendant, and the defendant by said contract promised to pay to the plaintiff, the sum of two thousand five hundred dollars, ($2500.,) as follows:

Two hundred dollars on completion by the plaintiff of said work and the balance in monthly installments in sums equal to ten per cent. of the monthly coal bills of the defendant, such installments to be payable not later than the 5th day of each month.

And the plaintiff says that the monthly coal bills of the defendant amounted to the sum of to wit one thousand dollars for each and every month after the installation of said furnaces and that under the terms of the aforesaid contract, there became due to the plaintiff on to wit, May 28th, 1901, the sum of two hundred dollars; on June 5th, 1901, one hundred dollars; on July 5th, 1901, one hundred dollars, and on August 5th, 1901, one hundred dollars, on account of the aforesaid total price of twenty-five hundred dollars, but though often requested so to do, the defendant has hitherto refused and still refuses, to pay to the plaintiff the said several installments on account of the said total price as the said installments severally became due and payable under the terms of said contract.

4 2nd count.

And the plaintiff sues the defendant for other money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant and for goods sold and delivered by the plaintiff to the defendant and for work done and materials provided by the plaintiff for the defendant at its request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at its request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims the sum of five hundred dollars, ($500.00) with interest on two hundred dollars from May 28th, 1901, on one hundred dollars from June 5th, 1901, on one hundred dollars from July 5th, 1901, and on one hundred dollars from August 5th, 1901, according to the particulars of demand hereto annexed, besides costs of this suit.

H. J. BARRETT,
JOHN RIDOUT,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays occurring after the day of the service hereof, otherwise judgment.

H. J. BARRETT,
JOHN RIDOUT,
Attorneys for Plaintiff.

5 *Particulars of Demand.*

In the Supreme Court of the District of Columbia.

THE HAWLEY DOWN DRAFT FURNACE COMPANY, Use, etc.,
vs.
PURITY ICE COMPANY. } At Law. No. 44900.

Particulars of demand under 2nd count.

Purity Ice Company to Hawley Down Draft Furnace Company, Dr.

To the following installments payable under contract dated Feb. 11th, 1901, for furnishing two Hawley down draft furnaces and attaching the same to Campbell & Zell boilers of about 275 H. P. each, with suitable front (lower part) grate bars, all necessary pipes and fittings and all special tile necessary to make the furnace part complete, to wit:—

1901, May 28th.	To first installment.....	$200.00
1901, June 5th.	" second installment, (being ten per cent. of coal bill).....	100.00
1901, July 5th.	To third installment, (being 10 % of coal bill).....	100.00
1901, Aug. 5th.	To fourth installment, (being 10 % of coal bill).....	100.00
		$500.00

with interest on $200, from May 28th, 1901, on $100, from June 5th, 1901, on $100, from July 5th, 1901, and on $100, from Aug. 5th, 1901.

6 *Plea of Defendant.*

Filed September 21, 1901.

In the Supreme Court of the District of Columbia.

THE HAWLEY DOWN DRAFT FURNACE COMPANY of Maryland, a Body Corporate, for the Use of Henry Vick *et al.*, Plaintiff,
vs.
PURITY ICE COMPANY, a Corporation, Defendant. } At Law. No. 44900.

The defendant, The Purity Ice Company, for plea to each and every count of the declaration herein filed says that it did not un-

dertake or promise in manner and form as in said declaration alleged.

WOLF & COHEN,
Attorneys for Defendant.

Joinder of Issue, &c.

Filed September 24, 1901.

In the Supreme Court of the District of Columbia.

HAWLEY DOWN DRAFT FURNACE COMPANY, Use, etc., *vs.* PURITY ICE COMPANY. } At Law. No. 44900.

The plaintiff joins issue on the defendant's plea.

HARRISON J. BARRETT,
JOHN RIDOUT,
Attorneys for Plaintiff.

7 *Memorandum.*

February 9, 1903.—Verdict for plaintiff for $500. with interest on $200. from May 28, 1901—on $100. from June 5, 1901—on $100. from July 5, 1901, and on $100. from August 5, 1901.

Supreme Court of the District of Columbia.

FRIDAY, *February 20th*, 1903.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

THE HAWLEY DOWN-DRAFT FURNACE COMPANY of Maryland, a Body Corporate, for the Use of Henry Vick, George F. Whiting, and Frederick H. Gottlieb, Co-partners Trading as Vick, Whiting & Co., Lessees of the Hawley Down-draft Furnace Co. of Maryland, Plaintiffs, *vs.* PURITY ICE COMPANY, a Corporation, Defendant. } No. 44900. At Law.

Upon consideration of the defendant's motion for a new trial filed herein February 11th, 1903, it is ordered that the same be and it is hereby overruled, and judgment on verdict is ordered. Therefore, it is considered and adjudged that the plaintiffs herein recover of

the defendant herein, the sum of five hundred dollars, ($500.00) with interest on two hundred dollars ($200.00) thereof from May 28th, 1901; on one hundred dollars ($100.00) thereof from June 5th, 1901; on one hundred dollars ($100.00) thereof from July 5th. 1901
8 and on one hundred dollars ($100.00) thereof from August 5th. 1901, being the money payable by said defendant to said plaintiffs by reason of the premises, together with their costs of suit to be taxed by the clerk, and have execution thereof.

Order for Citation & Appeal.

Filed March 9, 1903.

In the Supreme Court of the District of Columbia, the Ninth Day of March, 1903.

THE HAWLEY DOWN DRAFT FURNACE COMPANY of Maryland, a Body Corporate, for Use — Henry Vick *et al.*, *vs.* PURITY ICE COMPANY, a Corporation.	At Law.	No. 44900.

The defendant notes and prays an appeal to the Court of Appeals from the judgment rendered herein on the 20th day of February 1903 and the clerk will please issue a citation to the plaintiff (appellee).

WOLF & COHEN,
Attorneys for Defendant.

9 In the Supreme Court of the District of Columbia.

THE HAWLEY DOWN DRAFT FURNACE COMPANY of Maryland, a Body Corporate, for the Use of Henry Vick, George F. Whiting, and Frederick H. Gottlieb, Copartners Trading as Vick, Whiting & Co., Lessees of the Hawley Down Draft Furnace Co. of Md., *vs.* PURITY ICE COMPANY, a Corporation.	At Law.	No. 44900.

The President of the United States to the Hawley Down Draft Furnace Company of Maryland, a body corporate, for the use of Henry Vick, George F. Whiting, and Frederick H. Gottlieb, copartners trading as Vick, Whiting & Co., lessees of the Hawley Down Draft Furnace Co. of Maryland, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing

the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia, on the 9th day of March, 1903, wherein The Purity Ice Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 9th day of March in the year of our Lord one thousand nine hundred and three.

J. R. YOUNG, *Clerk*,
By W. E. WILLIAMS, *Ass't Clerk.*

Service of the above citation accepted this 9th day of March, 1903.

JNO. RIDOUT,
Attorney for Appellee.

10 *Memorandum.*

March 11, 1903.—Appeal bond—filed.

Supreme Court of the District of Columbia.

FRIDAY, *March 27th*, 1903.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

THE HAWLEY DOWN DRAFT FURNACE Co. of Maryland, to Use, &c., Plaintiff, *vs.* PURITY ICE COMPANY, a Corporation, Defendant.	At Law.	No. 44900.

Comes now the defendant herein by its attorneys, and presents to the court its bill of exceptions taken at the trial of this cause, and prays that the same be signed and made of record now for then, which is accordingly and so ordered.

11 *Bill of Exceptions.*

Filed March 27, 1903.

In the Supreme Court of the District of Columbia.

THE HAWLEY DOWN DRAFT FURNACE COMPANY of Maryland, to Use of Henry Vick *et al.*,
vs.
PURITY ICE COMPANY, a Corporation.
} At Law. No. 44900.

Be it remembered that on the 5th day of February, 1903, before his honor Justice Harry M. Clabaugh and a jury the plaintiff to maintain the issues joined on its behalf produced HENRY VICK, a witness of lawful age, who being duly sworn testified as follows:

My name is Henry Vick. I am a member of the firm of Vick, Whiting & Company, composed of George F. Whiting, Fred H. Gottlieb and myself. The signature on the paper shown me (referring to the contract sued on) is mine, and the signature under the word "accepted" was signed by J. E. McGaw in my presence on February 12, 1901. Vick, Whiting & Company leased patent rights of the Hawley Down Draft Furnace Company of Maryland, including Maryland, Delaware, the District of Columbia, and the two Virginias of the Hawley Down Draft Furnace Company.

Whereupon the plaintiff offered in evidence the paper identified, which was in words and figures, as follows:

"BALTIMORE, MD., *February* 11, 1901.

Purity Ice Company, Washington, D. C.

GENTLEMEN: We propose to furnish you two Hawley down
12 draft furnaces and attach same to Campbell & Zell boilers of about 275 H. P. each. We to furnish suitable front (lower part) grate bars and all necessary pipes and fittings, also all special tile necessary to make the furnace part complete. For the sum of twenty-five hundred dollars, $2500. Terms two hundred dollars on the completion of our work, and the balance to be paid in monthly installments of 10 % of coal bill each; payable not later than the 5th of each month.

We agree to furnish free of cost for a term of two years any part of water grate or water connections.

Furnace to remain our property until accepted and paid for by purchaser.

No provision hereof can be waived or varied, except in writing and signed by us.

THE HAWLEY DOWN DRAFT FURNACE CO.
OF MARYLAND.
VICK, WHITING & CO., *Lessees.*
HENRY VICK, *Manager.*

Accepted:
PURITY ICE COMPANY,
By J. E. McGAW, *Mgr.*

We accept conditions of above propositions and agree to make settlement accordingly.

The completion of the boilers not to be delayed by the attachment of furnaces."

The words "of $150 each," were changed by McGaw crossing out the figures "$150" and inserting in his own handwriting, "10 % of coal bill." I fulfilled the contract to the letter and the furnaces were ready for work about April 21st. The Purity Ice Com-
13 pany's coal bill during June, 1901, July 1901, and August 1901, averaged $1,000 each month.

It was admitted that defendant is a corporation under the laws of the District of Columbia. Witness further said, "I have not been paid any part of the money under the contract."

Thereupon the cross-examination of the witness was begun and counsel for the defendant stated that he proposed to ask questions of the witness to elicit what negotiations and representations had been made by him before the execution of the agreement, to which counsel for the plaintiff objected on the ground that the evidence sought to be introduced was not admissible because the written agreement set forth in the declaration embodied the whole contract of the parties, that evidence of antecedent negotiations or representations should not be given for the purpose of altering or varying the written agreement, that such evidence was inadmissible under the pleadings and that it could not in any event be obtained on cross examination. Counsel for plaintiff admitted that he had actual notice of the defenses.

Whereupon the court suggested that all testimony of this nature be taken subject to exception on the part of the plaintiff with the right to the plaintiff at the proper stage of the proceedings to move to strike out all such testimony. The court further saying by way of explanation, "It is very common practice, all this testimony now goes in subject to exception. If finally the court finds it is not proper, then on motion to strike out it is as if it had never been spoken and defendant's counsel can except to the ruling. If, on the other hand, the court holds it is proper testimony to go to the
14 jury, then the plaintiff's counsel can except to all that character of testimony, thus both sides get the benefit of the ruling."

Thereupon and under the arrangement above stated the witness testified on cross examination as follows:

The reason for the change, to "10 % of coal bill" was so Purity Ice Company would not be out. I assumed that there would be at least a saving of $150 on coal a month and estimated the percentage at ten per cent.

Q. You understand the difference between estimating and guaranteeing, do you not, Mr. Vick?

A. I did not guarantee anything in that contract.

Q. I asked you if you knew the difference between estimating and guaranteeing?

A. Very plainly.

Q. I want to get a complete answer whether you made a guarantee or an estimate.

A. If I made a guarantee it would be in the contract.

Q. It would have been in the contract?

A. Yes. We made various kinds of contracts, one guaranteeing and one not. I knew when to stop.

I recognize the paper handed me as a circular issued by the Hawley Down Draft Furnace Company and know its contents thoroughly. I did not draw McGaw's attention to the guarantee on page 11 of this circular which I handed him.

I said to Mr. Lee Hutchins at various times when I was drawing his attention to the furnaces that instead of paying coal merchants what he had been in the habit of paying, to pay me for a limited period of time the saving that the furnaces would make to him.

15 The old condition was four old return cylinder boilers in one boiler house, rated at about 100 horse power. McGaw had then no intention of building new boiler house or new boiler or new stack or anything else. I told him I was willing to put one furnace on one boiler and make a comparative test. If my furnace did not show a saving I was to take the furnace out and put his boiler back in the condition it was in before and he was nothing out. If it did, he was to pay me a percentage of the coal bill saved. When they got ready to put in the new boiler plant it necessitated a larger plant, doing away with two boilers, briefly, and the consequence was I could not tell what his coal consumption would be under the new installment and referred him to the Bureau of Engraving, the Star building, the Post building, and the U Street pumping station, where they pumped the water and weighed the coal and had an accurate result of the water pumped and the coal burned. I told them to refer to the records on file and they would be able to see the results and if the furnace then was satisfactory to them I would put them in. I had him satisfy himself on the boilers here with like conditions and like boilers. I accepted the contract and hurried the work along as fast as possible and the furnace is in and working to-day. The furnaces will do everything that was expected of them, while not guaranteed. I could not guarantee them because I did not know the conditions that would follow after the installation. With new machinery and new boilers and everything it would be a piece of folly for me to make any guarantee based on uncertainty. I wrote a letter after the installation on April 29th, asking for the first $200 due on the work, and in reply

16 received a letter signed by Mr. Lee Hutchins calling my attention to the fact that I had guaranteed a whole lot of things and if I did not fulfill my guarantee he would not pay the bill. I then came over to Washington and met McGaw and we talked for fully an hour, and I said that I was under no obligation and no guarantee to make any tests, but in order to set McGaw right before his people, I was willing to make a test. He said, "I went down

there the other day just as they were reading the letter and they jumped all over me, finding fault with the contract I signed." I said, "In order to set you right before your people I am willing to go to the expense of $100 or $125 to make a test of the boiler," showing that the boiler was developing the horse power I told him they would get after visiting their plant. I also told him if he would assist my men I would come over there and put in tanks and get all ready; and for making the test I engaged a man at $50 a day to come over from Philadelphia and make the test, not because I was under any obligation to do it but in order that he might make himself right before his people. I brought this gentleman over from Philadelphia and made all arrangements to make the test. Then McGaw wanted it made in a certain way and I said, "There are certain rules of the Society of Mechanical Engineers to be followed in running these tests. This man is a member of the Society of Mechanical Engineers and these people have rules and if you want that test made that way I will run it, but if I am not permitted to run the test according to these rules," I said "we will call the test off." He consulted with the engineer, Mr. Thompson, very carefully, and Mr. Thompson and he decided that he was all
17 ready. We got already to start the test, and when we got ready McGaw came back from his breakfast and said, "Now, are you going to run this test half water through the heater and half through the tank?" I says, "We are going to run it all through the tanks so we will know to an ounce every pound of water that is evaporated and every pound of coal that is burned." And he said, "That won't be satisfactory to me." And I said, "If it is not satisfactory to you, I am through." There was a whole lot of pipe in connection with the pumps. The water was pumped from the heater or pumped through the heater. It was taken from the main and pumped to the heater and through the heater into the boiler and those pipes passed down underneath the ground and the elbows and valves and various other connections were buried out of sight and in order that we would have no air and no leak—the valves might leak and let the water pass off which might otherwise show evaporation; and it was in the interest of accuracy that these pipes were carried above the ground so we would see there was no leakage and no water leak out that did not go through the pumps and none leak out that would be wasted. And if we run that test as he wanted it would show a larger evaporation than it otherwise would have, and it would show the boiler doing more work than it actually did. I wanted to use this method for its accuracy. I gathered up my tools and got my helpers together and walked off, and the next thing was I notified them that they would have either to pay or put it in court.

Whereupon the plaintiff rested. It was understood and agreed between counsel on both sides and the court that the arrange-
18 ment made during the cross examination of the witness Vick should apply to the testimony of the witnesses for the defendant and that all testimony touching conversations or negotia-

tions between plaintiff and defendant antecedent to the agreement of February 11, 1901, or concerning negotiations as to capacity of furnaces either as to saving of fuel, consumption of smoke, as to tests or catalogues, or any other subject connected with said furnaces, should be understood to be objected to by plaintiff and with the right to plaintiff to move at the close of the case to strike all such testimony out.

And thereupon the defendant to prove the issues joined on its behalf produced LEE HUTCHINS, who being duly sworn testified as follows:

I am the treasurer of the Purity Ice Company. I had a conversation with Vick in regard to improved furnaces which would consume smoke and save coal the first time I met him in the middle of January, 1901, which was just after the smoke law was passed. Vick told me that he would install the Hawley down draft furnaces in place of the furnaces furnished in the new boilers. We were about to complete a plant with larger boilers and Vick told me that his furnace would consume the smoke and save 15% of fuel that we had before used to produce the same power and we could pay him the saving, the first payment to be taken in the shape of boiler fronts, and grates thrown out of service or displaced by his. I was in a hurry and told Mr. Vick and McGaw who had authority to make contracts for the Purity Ice Company, to talk it over and see me again, which they did some weeks after. I told him that we incurred a pretty heavy bill for the plant and he again stated that this would be no extra drain on the resources because we only paid as we
19 saved, and we paid him instead of paying the coal bill that we would have to pay any way.

Whereupon witness was asked, "Did you visit any plants equipped with this down-draft furnace?"

A. Only one; the Centre market—yes, I did; the U Street pumping station after the contract was made.

Q. Before that?

A. No, sir. Mr. Vick and I went down to the Centre Market power house.

Q. Did you make any examination of it?

A. I watched it for about half an hour or three quarters.

And witness further went on to say: I told him that we were going to put in new Campbell & Zell boilers and we could not see how we could estimate a saving because we never used those boilers. We had used and were going to tear out, in order to put in this very machinery, three or four old boilers. I suggested three pounds per horse power per hour as a fair estimate, that is, for the consumption of those boilers with the ordinaryg rates; no special devices or anything of the kind.

Q. By grates, you mean furnaces?

A. Furnaces; that is part of the grate.

He said we could take that as a basis of comparison and he would guarantee a saving of 15% on that basis, and would prove it by a

test; and that if it was not satisfactory he would take the boilers out and restore the old furnaces and grates and boiler fronts; because he takes out half the boiler front to put his device in.

20 Q. I want to be certain about this—as to the time when this conversation took place in reference to the test.

A. At the time the test was to take place?

Q. The time of the statement as to the test?

A. It took place at the second interview I had with Mr. Vick. It took place about the 10th of February, 1901.

The Hawley down draft furnace makes no difference as to our coal bill, that is, compared to the consumption under the old tubular boilers. The new boilers had an automatic feed which the old boilers did not have, and which is supposed to be a saving by regulating and keeping a uniform heat of water in the boiler.

On cross examination witness said, "I took the old boilers out about the middle of January or the first of February 1901, and I am still using those two furnaces.

On re-direct-examination the witness testified: Mr. Vick and his attorney called to see me in July, 1901, and demanded payment which I refused. They left the office together and the attorney returned in less than a minute or two and asked whether I consider that I had accepted the boilers. I declined to answer that question and he said, "Well, we consider that you haven't accepted them and we shall remove them," and I said, "All right."

Whereupon the defendant to prove the issues joined on its behalf produced J. E. McGaw, who being duly sworn, testified as follows:

I am the president and general manager of the Purity Ice Company and installed the plant there in 1895. The first time I

21 ever saw Mr. Vick was in the first half of January, 1901, when he came into the office and introduced himself and said he wanted to talk with me in regard to a furnace. He pulled out a catalogue and said that he understood that we were going to add new machinery to our furnace and he wanted to install his furnaces.

Whereupon the defendant offered in evidence the catalogue identified by the witness, and upon the objection of the plaintiff's counsel, the court refused to admit the same, to which ruling the defendant by its counsel then and there duly excepted, and the court noted the exception upon its minutes.

Thereupon in connection with the foregoing testimony and matters the witness further testified:

It would save fuel and increase the efficiency of the boiler at least 25 %. We then had in four return tubular boilers that we were working our plant with at that time; and I told him I was going to take those out and put in one or two boilers. Well, he says, "I can install this furnace under these boilers and increase the efficiency of the plant at least 25 % and make the coal saving from 12 to 15 per cent. If I don't do this I am willing to take these furnaces out from under your boilers and install the old grates, and put your new boilers in the same condition that they would be if we had not installed our furnaces."

I told him I had just made a contract for $53,000 worth of machinery with the De La Verne Ice Machine Refrigerating Company, and if he would come around in a year's time, I would be glad to talk with him and might feel like spending some more money for machinery, but at this time I did not care to talk about it
22 because I did not care to go deeper into expense, and Vick said, "This is just the point I want to talk with you on. You say you want to manufacture ice as cheaply as anyone else; and by putting in these furnaces under your boilers that you are going to install, the Campbell & Zell water tube boilers, I can save you at least from 12 to 15 per cent. of the coal bill, which you pay to me instead of the coal man." The next time I saw him, a few days later, he told me the price of his furnace was $2500 for the two; and he said, "In a year or so you will pay for these machines by the saving of 12 to 15 per cent. in the coal bill and you will never miss it." He said, "The money you are paying out to coal men you will pay to me and at the expiration of a year or so you will have this device already paid for and won't miss it." The third time he came he brought a boiler man with him named Barr and introduced him to me to sell me boilers. I told Mr. Barr that we had contracted for boilers and we did not wish any, and Mr. Vick began on me about the Hawley down draft furnace. The next time I saw him was at Hutchins' office, and we talked about the Hawley down draft furnace in a general way. Later in the evening Vick came up to the office after dark, and said, "Well, Mr. Hutchins and I were down at the Centre market, and he seemed to like the furnaces very well, and everything is arranged for you to now sign the order,"—the contract for the furnaces—he had it with him. I said, "You understand, Mr. Vick, I don't want to put anything into this because I am afraid it will delay the installation of the machinery." I was under contract with the De La Verne Company to give them a new engine room, and I was taking the old boilers out of the old boiler room and making
23 an engine room of it, and I was under contract to give the De La Verne Company the old boiler room for an engine room on March 6th. And I said, "You understand this very clearly, that I cannot afford to be delayed, but if Mr. Hutchins says to me to sign this contract, why, I will do it, but the proviso must be put in here that I shall not be delayed." And we were delayed about 10 days or perhaps two weeks. And I insisted upon him putting it in at that time. Later after the furnaces were in and Mr. Vick asked for the remittance of $200, I told him he must make the test which he promised, and he said, "Suppose I make this test and it does not turn out satisfactory, will you pass these furnaces?" I said to him, "Emphatically, I will not." And he said, "Why you have had the use of them for two months." And I said, "That does not make any difference; I haven't accepted them and I will not accept them until the test is made. Now, you don't want to act the boy. If you are sure you have got a good thing, why, make the test and demonstrate that you have, and I will see you get the money," and he said, "I

will make the test." And I said, "Well, that is like a man." And he said, "We have to get a couple of barrels. I will be up there tomorrow." I think he said tomorrow. He did come and he prepared to make the test under the ordinary circumstances—under the conditions that we were then running. We were taking water and running it through the heater and comparatively heating it before we put it into the boilers, and he arranged to make the test under those conditions. I furnished him the barrels and the pipes that were necessary to connect the barrels to the hot water heater also to the
feed water pump, and the barrels were measured and weighed
24 and a stamp made on everything. The bed of the furnaces
were cemented and cleaned out. A man crawled all around there and cleaned out the furnaces and cemented them all around the side so as to prevent air from getting in the furnace so as to make a genuine test. I thought he was sincere and I thought he would make a genuine test. He got through sometime between seven and nine o'clock and said, "Everything is ready for the test tomorrow morning except the scales. You haven't the scales in the pit." I said, "It is all right; I will have them by seven o'clock and that will be all right. We both parted agreeably and he went off. Next morning I got at the plant about 4 o'clock, and before seven I had the scales down in the pit, and the boxes in it to weigh the coal, and Mr. Vick came. I usually came back about 8 o'clock—from 8 to 8.30, and he had an expert with him and he then raised the question about making this test ordinarily, that is, in the ordinary way he prepared to make it the day before. He said that there might be some leak in the pipes that was not in the other pipe, that it was a little more fair to him the other way than it was this way. He wanted to make it that way and he wanted to make it with the cold water test. And I objected to that. Now, I said, "I am willing to meet you half way in this thing because I am as anxious for a good result as you are. I don't object to paying for this furnace if it is an economy, and if you are willing to run 6 hours with the hot water test and 6 hours with the cold water test, I am with you, and we will go ahead and make it." It was positively understood that would be done. I then went off to breakfast and when I got
back they were all setting around in the engine room. I said,
25 "What is the matter?" and Mr. Vick said, "I am going to
make this test with cold water." I said, "Won't you make it half one way and half the other?" And he said, "No, we are going to make it altogether with cold water." And I said, "I don't agree to that." He had on his overalls and jumpers too—I think he had on jumpers; and he pulled them off and said, "I will wipe my hands of the whole business." And he went off. My objection to his making the test the way he wanted to make it was that he was to save us from 12 to 15 per cent. of coal. I wanted the actual saving in coal and I wanted a test made under the conditions that we were then running the boilers, and expected to run them under in the future at all times. And he being more of an engineer than I was, when he put it into figures, say so many pounds of cold water

evaporated by so many pounds of coal, say so many of this to one of the other, I could not refute it—I could not deny it. But when he burned so many pounds of coal to evaporate so many pounds of water running under the conditions that we were then running under, I would know whether I was saving money or not saving money. It was a matter of calculation. It was a fact what was being done. We evaporated so many pounds of water with so many pounds of coal. If it had to be calculated, then, he might confuse me in figures. The furnace consumed smoke in this regard, if you let the furnace or boilers do about ⅔ of their capacity or about ⅔ of what they really ought to do, you would see very little smoke, but if you forced those boilers to their capacity, not saying 25 % over their capacity, but even up to that capacity, there would be as much smoke as there would be from the other furnace we
26 have in there now that is not equipped with the Hawley down draft furnace. This is, running the boiler on ⅔ duty.

Vick turned to the page of the circular where the guarantee was written, and pointing to one of the lines with his finger, he said, "This is what we guarantee." (And the witness indicated the following paragraph in the circular which was in words and figures as follws:

The Hawley down draft furnace can be attached to any type of water tube, tubular or flue boilers, and is offered to steam users with the following guarantees.

1. To consume 95 % of the smoke under all conditions, regardless of quality of soft coal burned.
2. Will burn 30 to 40 lbs. of coal per hour per foot of grate surface, with good economy.
3. Will evaporate 10 % more water per pound of coal than can be done by any other system.
4. Will increase the capacity of the boilers 50 % with perfect safety and good economy of coal.
5. Will furnish uniform temperature of more than 2500 degrees Far-enheit to every part of heating surface.
6. Will cost less for repairs than any other furnace or stoker.)

Thereupon, the defendant in order to show what the furnaces of the plaintiff were and the other guarantees made by the plaintiff in its said circular and because of the testimony heretofore set forth, offered the entire circular in evidence the whole of said circular having been previously submitted to the court, and which said circular besides other descriptions on other pages contained on page 11, the following guarantees:

27 *We Guarantee*

To prevent 95 % of the smoke, burning any grade bituminous coal.

It will increase the capacity of the boilers from 25 to 50 per cent.

It will save from 10 to 40 per cent. in the cost of fuel.

Should our furnaces fail to do as guaranteed, we agree to remove them and replace the former setting at our expense.

On the same page over the reproduction of a Hawley down draft grate, are the words,

All our furnaces are sold upon positive stated guarantees of economy, increased capacity, and smokelessness, and attached to boilers at our expense.

To the admission of which circular the plaintiff objected and the court sustained the objection, to which the defendant by its counsel then and there excepted, and the court noted said exception upon its minutes.

Thereupon, in connection with the foregoing testimony and matters, the witness on cross examination further testified that the Hawley down draft furnaces were still being used by the defendant.

Thereupon, in connection with the foregoing testimony and matters, the defendant to maintain the issues joined on its behalf produced GEORGE C. THOMPSON, who testified:

I am and have been in the employ of the Purity Ice Company as engineer for the past 8 years. I am familiar with the old plant which consumed 8 tons and 10 cwt. of coal in 24 hours. It takes less coal to run a 200 horse power boiler than it does to run a 100 horse power boiler, both having the same amount of work to do. It took 9 tons of coal to run the machinery with the new boilers having the Hawley draft furnaces attached, although on the new
28 boilers we had an automatic feed which is supposed to save 10 % of coal, and which device was not on the old boilers. The capacity of the plant beginning in August 1901, was enlarged, but up to that time was the same as it had been for the seven years, and thereupon the defendant rested. The foregoing is all the testimony offered in the case on trial.

Whereupon the plaintiff by its counsel moved the court to strike out all the testimony of all the witnesses in the case whether on direct or cross examination touching conversations or negotiations between the plaintiff and defendant antecedent to the agreement of February 11, 1901, given in evidence in this case, also all testimony concerning representations as to capacity of furnaces, either as to saving of fuel, consumption of smoke, or on any other subject connected with said furnaces; as to conversations, agreements, or arrangements as to tests between the plaintiff and defendant, also the catalogue offered in evidence by the defendant so far as it was admitted in evidence, and the court granted the motion, to which the defendant by its counsel then and there duly excepted, and the court noted said exception upon its minutes.

Thereupon in connection with the foregoing testimony and matters, the defendant by its counsel moved the court to return a verdict for the defendant on the ground that it had not been shown that Vick had any authority from the plaintiff to make this contract on its behalf. Counsel for the plaintiff called attention to the fact that Vick testified that Vick, Whiting & Company were lessees of the Hawley Down Draft Furnace Company, that the contract had been

admitted without objection, and added: "I wish to state that
29 we had here on Thursday the proof to show with the greatest minuteness the history of the title in Vick. We proved by Vick what we did prove and the contract was offered and admitted without objection and now the witnesses and the notary public who took the acknowledgment of the lease have been allowed to go back to Baltimore.," But the court refused to grant the prayer, to which ruling the defendant by its counsel then and there duly excepted, and the court noted said exception upon its minutes.

Whereupon the plaintiff offered the following prayer, "The jury are instructed as a matter of law that the evidence offered by the defendant does not establish any legal defense against the plaintiff's claim," and the court granted the prayer, to which ruling the defendant by its counsel then and there duly excepted, and the court noted said exception upon its minutes.

Thereupon the jury rendered a verdict for the plaintiff for $500 with interest as claimed in the declaration.

Be it further remembered that each of the separate and several exceptions taken by the counsel for the defendant, as hereinbefore set forth, was so taken by counsel for the defendant then and there before the jury retired and each of said exceptions was then and there separately and severally duly entered upon the minutes of the justice presiding at the trial, and the counsel for said defendant then and there prayed the court, and now prays the court, to sign this its bill of exceptions, and the same is accordingly done, now for
30 then, and made a part of the record in this case this 27 day of March, 1903.

HARRY M. CLABAUGH, *Justice.*

Supreme Court of the District of Columbia.

THURSDAY, *April 23rd*, 1903.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

THE HAWLEY DOWN-DRAFT FURNACE CO.
vs.
THE PURITY ICE COMPANY, Defendant. } At Law. No. 44900.

Upon motion of defendant's attorneys the time within which to file a transcript of the record herein, in the Court of Appeals, is hereby extended to June 1st, 1903.

31 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 30, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 44,900, at law, wherein The Hawley Down Draft Furnace Company of Maryland, a body corporate, for the use etc. is plaintiff, and The Purity Ice Company, a corporation, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 18″ day of May, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1330. Purity Ice Company, appellant, *vs.* The Hawley Down Draft Furnace Company of Maryland *et al.* Court of Appeals, District of Columbia. Filed Jun- 1, 1903. Robert Willett, clerk.